IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 832 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE M.C.PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BACHUBHAI AMARSING BARIA

Versus

STATE OF GUJARAT

Appearance:

MR KJ SHETHNA for Appellants No. 1-3
(MR VIVEK BAROT) for Petitioner No. 1
MS HANSA PUNANI, APP for Respondent No. 1

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE M.C.PATEL

Date of decision: / /2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE M.C.PATEL)

1. The appellants were the accused in Sessions Case No.140 of 1993 before the learned Additional Sessions Judge, Panchmahals. They were each convicted of the offence under Section 302 read with Section 34 of the I.P.C. and they were each sentenced to life imprisonment and a fine of Rs.500/-, in default, two months' R.I. They have challenged the said order of conviction and sentence in this appeal filed under Section 374 of the Code of Criminal Procedure.

2. The prosecution case was as follows:

2.1 The complainant Danabhai Kalubhai was living with his family in Madamahudi in village Gollav. He was employed as a Primary Teacher in village Talavna Muvada. His uncle Deepsinh alias Rayjibhai Saybabhai had purchased two acres of land from another uncle Dhulabhai Ramabhai. One Kalsinh Nanji had also purchased some land out of the said Survey No. Since the land was not transferred to the name of Deepsinh, he had instituted proceedings before the Mamlatdar. At about 7 o'clock in the evening on 29th May, 1993, Danabhai Kalubhai and Deepsinh started on Bajaj Scooter No. MAT GJ/17/5206 to go to village Shaniyada to attend the marriage of the sister-in-law of their cousin Hansaben. On the way, they saw their uncle Bachubhai Amarsinh Baria, who was employed in the Wireless Office at Godhra (accused no.1), his nephew Arjunsinh Parvatsinh (accused no.3) and Vakhatsinh Narvatsinh (accused no.2) standing with their Rajdoot Motorcycle near the edge of the pond of village Madamahudi. While the complainant and Deepsinh were proceeding towards village Shaniyada on the scooter, Bachubhai Amarsinh started his motorcycle and all the three accused followed the complainant and Deepsinh who were going on the scooter. At about 7.30 when the complainant and Deepsinh were going up the slope of Navalsinh's Muvadi's hill, Bachubhai Amarsinh came on his motorcycle on the wrong side and brought it abreast on the left side of their scooter. Bachubhai Amarsinh (accused no.1) took the motorcycle across and said to Arjunsinh (accused no.3) "Here are the persons who have kept the land. Strike him with dharia from behind". The accused no.3 then struck a dharia blow on the back of the neck of Deepsinh who was riding on the pillion seat. Both the complainant and Deepsinh fell off the scooter. They left the scooter and started running. The accused followed them on their motorcycle and Bachubhai Amarsinh (accused no.1) caught Deepsinh. Immediately accused

nos.2 and 3 came there running. Arjunsinh, accused no.3 gave a dharia blow on the front of Deepsinh's throat. Danabhai raised shouts and all the accused ran after him. However, Danabhai managed to escape through fields and the accused left the scene on the motorcycle. The complainant went running to his home and told his father Kalubhai Maganbhai and Sayba Ramsinh and others about the incident. On hearing about the incident, Kalubhai Maganbhai, Nanabhai Bhalabhai, Galabhai, Phoolsinh Hirabhai and Bhavsinh Hirabhai gathered there. Then they went to the place of the incident. They found Deepsinh dead and the scooter was lying nearby. The complainant Danabhai Kalubhai and others stayed there but Phoolsinh Hira and Bhavsinh Hirabhai went to the residence of Zhaverbhai Adesinh in the village. He was a member of the District Panchayat. Zhaversinh came there with a tempo. Zhaversinh Adesinh, the complainant and other people from the village went in the tempo to the residence of Sarpanch Jumabhai Tersinh at about 2 o'clock at night. Jumabhai was sleeping and he was woken up. He was informed about the incident. Jumabhai said that a complaint should be lodged with the police. Hence, the complainant, Zhaversinh Adesinh and Jumabhai Tersinhbhai went to the Police Outpost, Damavav. They reached there at about 5 o'clock in the morning. The Jamadar was on leave but one constable was present. He said that it was a murder case and the complaint must be lodged at the Police Station, Baria. They arrived at the Baria Police Station at about 6.30 in the morning. The P.S.I. was not present. The Jamadar was present. While he was told about the incident, P.S.I. Sharma was called to the Police Station. He recorded the complaint of Danabhai Kalubhai. He registered the offence and started investigation. He went in the early morning to the place of the incident. He called panchas and held inquest. The panchnama of the scene of offence was also prepared. The blood-stained clothes produced by the complainant were also attached under the panchnama. The accused were not traceable on that day but they were traced on the next day and they were arrested. The motorcycle was also seized under a panchnama. A blood-stained dharia was recovered from the house of the accused no.3 at his instance. The post-mortem was carried out at 3.00 p.m. on 30th May, 1993 by Dr. Chandrahas Sickelvis, who was Medical Officer in Devgadh Baria General Hospital. The attached articles were sent to the Forensic Science Laboratory and after obtaining its report, P.S.I. N.B. Joshi (p.w.10) submitted chargesheet in the Court of the Judicial Magistrate (First Class), Devgadh Baria who committed the case to the Court of Sessions, Godhra where it came to be numbered as Sessions Case No.140 of 1993.

3. Charge (Exh.3) was framed against the appellants for the offence under Section 302 read with Section 34 of the I.P.C. The accused no.3 was also charged under Section 302. The charge was read over and explained to the appellants but they pleaded not guilty and claimed to be tried.

4. The prosecution, in order to prove the charge against the appellants, examined

(i) p.w.1 - Danabhai Kalubhai (Exh.19) who was the complainant.
(ii) p.w.2 - Bhavsinh Hirabhai (Exh.20)
(iii) p.w.3 - Phoolsinh Hirabhai (Exh.21)
(iv) p.w.4 - Zhaversinh Adesinh (Exh.22)
(v) p.w.5 - Jumabhai Tersinh (Exh.23)
(vi) p.w.6 - Kalubhai Maganbhai (Exh.24)
(vii) p.w.7 - Saybabhai Hamirbhai (Exh.25)
(viii) p.w.8 - Rakesh Kumar Rajnikant (Exh.27) who was a witness to the discovery of the dharia by accused no.3.
(ix) p.w.9 - P.S.I. R.S. Sharma (Exh.29)
(x) p.w.10 - Narendrakumar Bansilal Joshi (Exh.31)
(xi) p.w.11 - Dr.Chandrahas Sickelvis (Exh.34) who performed the autopsy and
(xii) p.w.12 - Prabhatsinh Himatsinh (Exh.40) who was the Police Constable at Damavav Outpost.

5. The prosecution also produced documentary evidence such as panchnama of the scene of offence, inquest panchnama, post-mortem notes, FIR lodged by p.w.1 Danabhai Kalubhai, panchnama of recovery of clothes of the complainant and clothes of the deceased, panchnama of the motorcycle produced by accused no.1, discovery panchnama of the dharia and map of the scene of offence and the report of the F.S.L.

6. After the evidence of the prosecution was over, statements of the accused were recorded under Section 313 of the Code. The defence was one of general denial.

7. The learned Additional Sessions Judge, on appreciation of oral as well as documentary evidence and the arguments advanced by the learned Additional Public Prosecutor and the learned advocate for the appellants, held that the deceased died a homicidal death. He also further held that the accused no.1 had given the first blow at the instigation of accused no.3 and thereafter all the three accused had chased the complainant and the

deceased and the accused no.3 gave another dharia blow on the throat while the deceased was held by the accused nos.1 and 2. The learned Additional Sessions Judge, therefore, held that all the accused had common intention to kill Deepsinh and hence they were guilty of the offence under Section 302 read with Section 34 of the I.P.C.

8. The learned counsel Mr. K.J. Shethna appearing for the appellants and learned APP Ms. Hansa Punani took us through the entire record and proceedings of the case. We have gone through the entire evidence and reappreciated the oral as well as documentary evidence.

9. It is not in dispute that the deceased died a homicidal death. The evidence of Dr. Sickelvis (p.w.11), who carried out the post-mortem, shows that the deceased had the following external and internal injuries on his body:

External Injuries

1. Incised wound 2" x 1/2" x 1/2" on Lt. side of neck 2" below the Lt. mastoid bone. Direction was vertically downward & medially.
2. Incised wound 5" x 1" x 2" on the front side of neck in the middle part. Horizontal in direction.
3. Hyoid bone was fractured.

Internal Injuries

1. Muscles & Vessels cut below the injury No.1.
2. Muscles Vessels & Nerves cut. Thyroid cartilage cut in upper part below the injury No.2. Hyoid bone fractured.

According to the doctor, the cause of death was shock due to haemorrhage due to cutting of great vessels in the neck. The finding of the learned Additional Sessions Judge that the deceased died a homicidal death is, therefore, beyond challenge.

10. Mr. K.J. Shethna, the learned counsel for the appellants, after taking us through the entire evidence on record, contended that accused nos.1 and 3 were Government servants and would not have ventured to commit such an offence, that the accused no.2 was at the house of accused no.3 to attend a marriage, that there was inordinate delay in lodging the FIR and it was concocted

after deliberation, that the discovery of dharia was not reliable, that the prosecution had failed to establish adequate motive for the crime, that the manner in which the incident was alleged to have occurred was improbable, that, if the appellants were so determined as to commit the offence, they would not have spared the complainant, that no blood-stains were found on the scooter on which the complainant and the deceased were allegedly going and that the shirt of the complainant might have been stained with blood when he touched the body of the deceased. He contended that if the complainant and the deceased had seen the accused no.3 with a dharia, they would have apprehended the danger and would have accelerated the speed of the scooter. It was contended that, according to post-mortem report, there was semi-digested food in the stomach of the deceased which raises doubt about the time of the incident. He contended that the relations between the parties were admittedly strained and the appellants had been falsely implicated. He also submitted that even though, according to the complainant, he had fallen off the scooter, he had not suffered any injury. He submitted that the Police Constable at Damavav Outpost was bound to record the FIR but FIR was deliberately not lodged there. He submitted that the story of escape given by the complainant Danabhai Kalubhai was highly improbable. It was contended that there was no common intention and the appellants could not have been convicted with the aid of Section 34 of the I.P.C.

11. The learned APP took us through the judgment of the learned Additional Sessions Judge and submitted that the complainant was a reliable and trustworthy witness and his version was corroborated by post-mortem report and also the discovery of blood-stained dharia at the instance of accused no.3. She submitted that the appellants have been rightly convicted by the learned Additional Sessions Judge.

12. Now, the prosecution evidence rests mainly on the evidence of the sole eye-witness Danabhai Kalubhai (p.w.1). According to him, he and his two brothers were living together. He has four uncles, Phoolsinh Hira, Bhavsinh Hira, Gambhirbhai Chhaganbhai and Deepsinh alias Rayjibhai Saybabhai (it is not clear how far removed). Deepsinh had purchased land from Dhulabhai Ramabhai. One Kalsinhbhai Nanjibhai had also purchased other land from Dhulabhai Ramabhai. There was a dispute between Deepsinh and Kalsinh about the land purchased by Deepsinh. Kalsinh had got the land purchased by Deepsinh transferred in his name and that was the cause of

dispute. Deepsinh was in possession of the land. Phoolsinh Hira and Deepsinh Sayba had together purchased five acres of land. Kalsinh had purchased only one acre of land but he had got two acres of land mutated in his name. The Survey No. of the entire land was 156 which was in the sim of village Gollav. The dispute was pending in the Mamlatdar's court.

13. According to Danabhai, the incident occurred on 29th May, 1993. At about 7 o'clock in the evening, he and his uncle Deepsinh were going on their scooter to a wedding in village Shaniyada. The accused no.1 Bachubhai was his grandfather, the accused no.2 Vakhatsinh, his uncle and accused no.3 Arjunsinh was also his uncle (it is not clear how far removed). All the three lived in their village. The accused no.1 was employed as Police Constable in the DSP's office at Godhra. Arjunbhai, the accused no.3 was serving in Ahmedabad. The accused no.2 Vakhatsinh cultivated his land in the village. While they were going on the scooter, they saw all the three accused in the Babul Nursery near the village pond. The Nursery is on both sides of the road. The accused were standing beside the new Rajdoot Motorcycle of the accused no.1. Danabhai was riding the scooter and Deepsinh was on the pillion seat. They passed the three accused and when they had proceeded about 400 feet, the accused no.1 started the motorcycle and all the accused followed them. The accused no.1 was driving the motorcycle. The accused no.2 was in the middle and the accused no.3 was behind him. While Danabhai and Deepsinh were going up the slope near Navalsinh's Muvadi, the accused no.1 brought his motorcycle abreast of the scooter on the left side and said to accused no.3 "Here are the persons who kept the land. Strike him with a dharia." The accused no.3 then struck a dharia blow on the back of Deepsinh's neck. Danabhai and Deepsinh fell off the scooter. They started running away. The accused no.1 stopped his motorcycle at some distance and all the accused chased them. The accused no.1 caught Deepsinh. The accused nos.2 and 3 also came running and the accused no.2 caught Deepsinh and the accused no.3 gave a dharia blow across the neck. Danabhai raised shouts and the accused ran after him. He managed to escape. The accused turned back and went away on the motorcycle. Danabhai ran back to his home and told his father Kalubhai about the incident. He and his father went to Deepsinh's home. There they told Deepsinh's father and Deepsinh's wife Kapooriben and Kamlaben about the incident. His father Kalubhai, Nanabhai Bhalabhai, Galabhai, his uncle Phoolsinh Hira and Bhavsinh Hira gathered together and went to the place of incident. They saw that Deepsinh was lying dead in a

bleeding condition. The scooter was also lying on one side. Danabhai waited there and his uncle Phoolsinh Hira and Bhavsinh Hira went to the residence of Zhaversinh Adesinh who was a member of the District Panchayat. Zhaversinh Adesinh came there. He saw the dead body and told them to lodge a complaint with the police. Zhaversinh had come there with a tempo. Danabhai and several persons went in the tempo to the home of Sarpanch Jumabhai Tersinh. They woke up Jumabhai and told him about the incident. Jumabhai got ready and accompanied them to Damavav Outpost. There the Jamadar was on leave. They reached Damavav Outpost at 5 o'clock in the morning. The police constable who was on duty told them that it was a murder case and directed them to go to Baria Police Station. They, therefore, went to Baria Police Station. There also P.S.I. was not present. They had arrived at 6.30 in the morning. After sometime, somebody called PSI and he came there. P.S.I. recorded Danabhai's complaint. After the complaint was lodged, P.S.I. came with them to the place of incident and prepared a panchnama of the scene of offence. According to Danabhai, his shirt had become blood-stained when Deepsinh was given the first dharia blow and that was also attached by the police.

14. Danabhai's evidence is corroborated by the evidence of Bhavsinh Hirabhai (p.w.2), Phoolsinh Hirabhai (p.w.3), Zhaversinh Adesinh (p.w.4) and Jumabhai Tersinh (p.w.5) and Kalubhai Maganbhai (p.w.6). All of them supported Danabhai's version as to what happened after Danabhai came running to the village.

15. It was vehemently contended that there was inordinate delay in lodging the FIR and it was given after a long time and the whole story was got up after deliberation. However, the incident occurred in a remote village. After the incident, Danabhai ran back home. He informed other persons in the village. They went to the place of incident. Then they went to the residence of Zhaversinh Adesinh who was a member of the District Panchayat. Zhaversinh Adesinh went to the place of the incident. Then they went back to the village and woke up the Sarpanch Jumabhai Tersinh. Then they went to Damavav Outpost. The Jamadar was on leave and Police Constable Prabhatsinh (p.w.12) told them to go to Baria Police Station to lodge the complaint since it was a murder case. They arrived there at about 6.30 in the morning. P.S.I. Sharma was not available there but was sleeping in the rest house nearby. He was also woken up and called to the police station and then the complaint was recorded. In the circumstances, it cannot be said that

there was intentional delay in filing the complaint and that the accused were falsely implicated after deliberation. Zhaversinh Adesinh who was a member of the District Panchayat and Sarpanch Jumabhai are independent witness and there is no reason to disbelieve them. An attempt was made by the defence to show that Zhaversinh Adesinh had a telephone at his residence but did not use it to call the police. Even assuming that there was a telephone at his residence, the mere fact that all of them went to the police station instead of telephoning the police does not raise any doubt about the version given in the FIR.

16. It was contended that the manner in which the incident was alleged to have occurred was highly improbable. However, on reading the evidence of Danabhai, we are satisfied that he gave a very natural description of the incident as it occurred without embroidering or embellishing it. The fact that there was a dispute about the land is not disputed. In the cross-examination of Phoolsinh Hirabhai (p.w.3), it was suggested that the dispute had been going on for 18 years. It was contended that Danabhai would have suffered injuries, if he had fallen off the scooter. However, the scooter may have been going at a very slow speed and Danabhai may not have suffered any injury. It is true that the scooter was not seized but mere failure to seize the scooter is not sufficient to throw doubt on the evidence of Danabhai. In the circumstances, we see no reason to disbelieve Danabhai's version of the incident. His evidence is also corroborated by medical evidence.

17. Danabhai's evidence is sufficient to prove the charge against the appellants. The prosecution also relied on the evidence of discovery of the blood-stained dharia from the house of accused no.3. It is contended that when a search of the house of the accused no.3 was made on 30th May, 1993, nothing was found. However, this search was made in the absence of the accused who were not traceable. There is no reason to disbelieve the evidence of panch witness Rakeshkumar Rajnikant (p.w.8) in whose presence the discovery was made. The FSL report shows that the dharia was found to have been stained with blood of the same group as that of the deceased.

18. It was contended that there was no common intention to kill the deceased. However, Danabhai's evidence clearly shows that all the accused followed Danabhai and the deceased on the motorcycle and at the instigation of accused no.1, the accused no.3 gave a

dharia blow while the deceased was still on the scooter and thereafter they all ran after the deceased and the accused nos.1 and 2 caught and held him down and the accused no.3 gave another dharia blow. The accused no.3 gave fatal blows and he was guilty of the offence under Section 302 and it is clear from the part led by the accused nos.1 and 2 that they had common intention to kill the accused. They have, therefore, rightly been convicted of the offence under Section 302 read with Section 34 of the IPC. The appeal, therefore, fails and is dismissed.

(M.H. Kadri, J.)

(M.C. Patel, J.)

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